In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~774~~ 70-14

DR. JONATHAN O. COLE,
Superintendent, Boston State Hospital,
and
DR. MILTON GREENBLATT,
Commissioner, Department of Mental Health,
Commonwealth of Massachusetts,
APPELLANTS,

v.

LUCRETIA PETEROS RICHARDSON,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

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The appellee, Lucretia Peteros Richardson, pursuant to Rule 16 of the Rules of this Court, hereby moves to affirm the decision of the court below on the following grounds:

1. The decision of the three judge court is fully supported by prior decisions of this Court. In support of this argument, appellee cites the following decisions: *Wieman* v. *Updegraff*, 344 U.S. 183 (1952); *Torcasso* v. *Watkins*, 367 U.S. 488 (1961); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Whitehill* v. *Elkins*, 389 U.S. 54 (1967); *Gilmore* v. *James*, 274 F. Supp. 75 (N.D. Tex. 1967), *aff'd* 389 U.S. 572 (1968).

2. The "special circumstances" required for abstention by a lower federal court were not present in this instance. *Baggett* v. *Bullitt*, supra, at 375-378; *Zwickler* v. *Koota*, 389 U.S. 241, 251 (1967). Furthermore, although it would be highly inappropriate for appellants to raise the doctrine of abstention for the first time before this court in any case, it is doubly inappropriate here where appellants previously — in discussing mootness and speaking through the Attorney General of the Commonwealth — *expressly* urged the three judge court below to retain jurisdiction on remand from this Court and to decide the questions raised in appellee's complaint rather than to "await another case at a different time."

> "While the facts of this case are admittedly unusual, we do not think that they represent a situation where the Court is without jurisdiction of the complaint. In our view, there exist enough incidents of jurisdiction to sustain a consideration of the complaint on the merits. The facts which have been agreed to indicate that employment is available to the plaintiff is she decides to apply for it. We think that the Court can draw an inference from Plaintiff's testimony that she is ready to apply for employment in the project for which she was originally employed, but we leave to the plaintiff the opportunity to confirm that inference by an unequivocal statement on brief."

There is a further reason why this Court should not decline jurisdiction. This case has been fully briefed and argued, both in this Court and on the jurisdictional statement submitted to the Supreme Court. The oath prescribed by Mass. Gen. Laws, chapter 264, section 14 is presently required of persons beginning employment with the Commonwealth. In view of the declaration by this Court that the oath is unconstitutional, a final decision by the Supreme Court should not await another case at a different time. The matter should be settled now."

Supplemental Brief For the Defendants, pp. 3-4, filed with three judge court on May 21, 1970.

Finally, the decisions of this Court relied upon by appellant to support its belated abstention argument — *Harrison* v. *National Association for the Advancement of Colored People*, 360 U.S. 167 (1959); *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943) — are inapposite because each of those cases involved not the constitutionality of loyalty oaths and infringement on speech protected by the First Amendment but rather a federal equity court's involvement in difficult questions of state law. Moreover, in each instance there was no indication that abstention, as a doctrine of comity, was not properly raised first in the lower courts.

3. Lastly, the court below could not "sever" the more offensive portion of the oath in question, Massachusetts General Laws Chapter 214, section 14, because the oath is integral and the Massachusetts legislature made no provision for such a severance in enacting the oath.

Nor, as this Court has repeatedly noted, can a "narrow" construction salvage a hopelessly vague and overbroad statute like the oath in question. *Cramp* v. *Board of Pub-*

lic Instruction, supra; *Baggett* v. *Bullitt,* supra; *Whitehill* v. *Elkins,* supra.

For the reasons stated above, appellee respectfully moves that this Court affirm the decision of the court below.

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